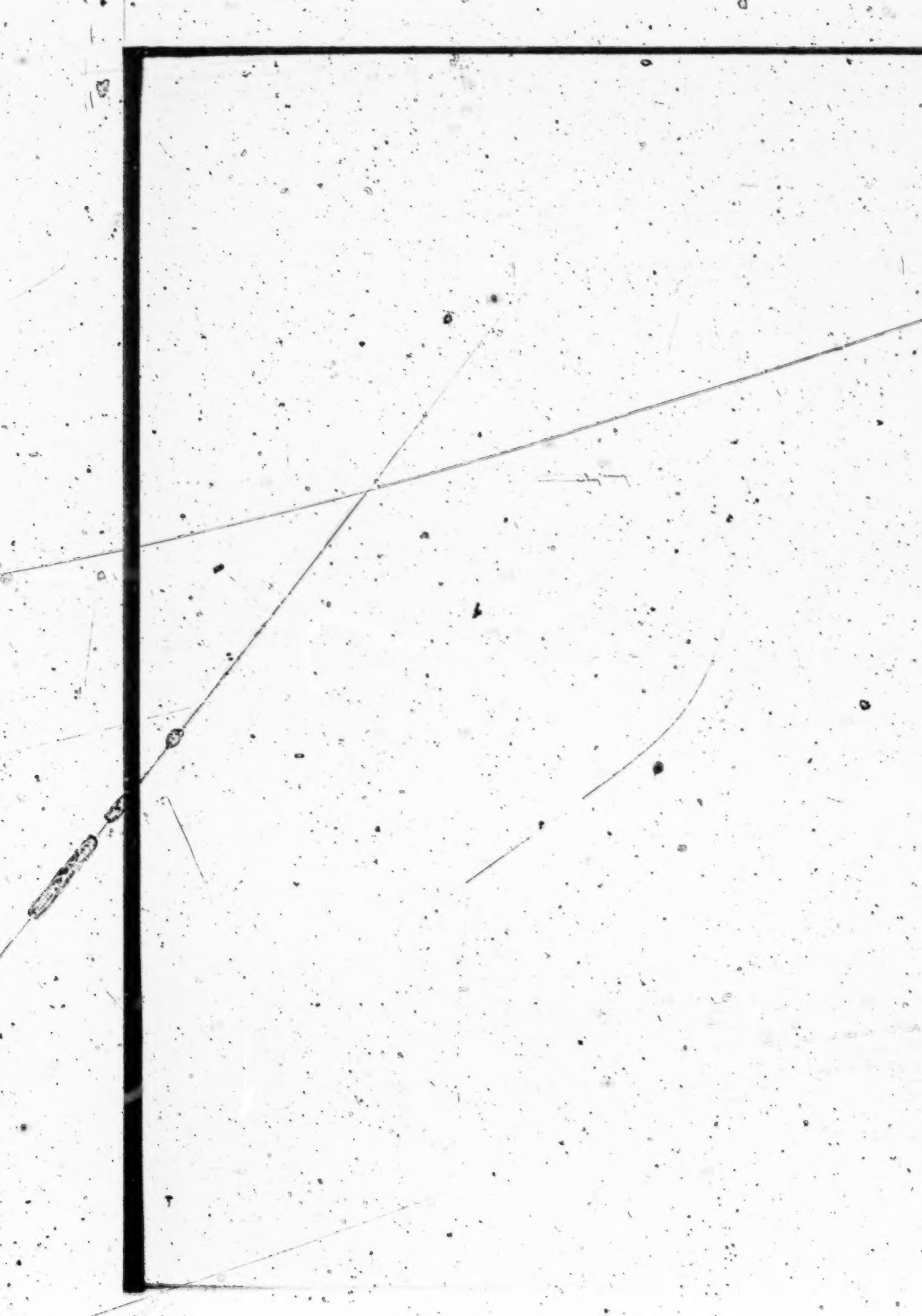

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 246

HERMAN MOSES, ROBERT ALLEN, JR., LARRY MAURICE, LAWRENCE JERRY, DONALD JERRY, STAN MOSES, BURT MOSES, EDWIN B. DANIELS, HOWARD MOSES, BETTY GOUDY, HENRY KING GEORGE, WALTER ALLEN, ANDY DOMINICK, ARCHIE LEBEHAN, CECIL MOSES, and the MUCKLESHOOT TRIBE OF INDIANS,
Appellants,

v.

THE STATE OF WASHINGTON, THE DEPARTMENT OF FISHERIES, and THE DEPARTMENT OF GAME,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

PETITION FOR REHEARING

COME Now the above-named appellants and petition for the rehearing of their appeal in the above-entitled case.

The Court may have indulged in the same error that the Solicitor General allowed himself to commit. He first said that the appellants were "precluded" from fighting the fishing wars because they had failed to assign error to the trial court's finding that no one had signed for the tribe in the Treaty of Point Elliott.

However, following appellants' printed reply and private communication to him, the Solicitor General reversed his position by stating in an additional memorandum:

> ". . . That result is premised on the conceded fact that, although non-signatories, their ancestors were named as contracting parties in the preamble to the treaty and were subsequently dealt with as parties to the treaty. Although the court below did not advert to it, we suppose this contention—essentially raising a question of law—would not have been viewed as procedurally foreclosed there, and, accordingly, remains open here. *Certainly, the point is not frivolous.* Indeed, it is the view of the Department of the Interior that the Smalh-kamish, Skope-ahmish and St-kah-mish Tribes, named in the preamble, were beneficiaries of the Treaty of Point Elliott . . ." (Emphasis supplied)

Perhaps what compelled the Solicitor General to revise his view was the trial court's finding that the appellants ceded their land to the United States *by reason of the Point Elliott Treaty* and thus were *beneficiaries* of the Treaty, irrespective of the signatories. This has been appellants' contention continually—that there is no reason to object to the finding that they were not signatories because the trial court found that they, as aforesaid, were beneficiaries.

As the Solicitor General stated, this point is "not frivolous" nor is it "procedurally foreclosed." Thus, as beneficiaries, the Solicitor General did and the Court should follow the rationale of *Northern Pacific Railway Company v. United States*, 227 U.S. 355, 356-367 (1913).

In the *Northern Pacific* case, the dispute was over an interpretation of the Yakima Treaty relating to the area of the reserved lands and an ambiguity in the words of

reservation. In a sense, it was urged that because the Land Department had for some decades held a view restricting the size of the reservation and thereby enlarging the public domain, a *fait accompli* had been effected; but the Court rejected such an argument stating:

> If the government may control the cession and control the survey and by the action of its agents foreclose inquiry or determine it, an easy means of rapacity is afforded much quieter but as effectual as fraud. We should hesitate to put the government in that attitude. It rejects that attitude and *accepts a greater responsibility*. 227 U.S. 355, 366 (Emphasis added)

Thus, if, *as the trial court found as a fact*, the Muckleshoots ceded their lands by reason of the Point Elliott Treaty, but then the burden imposed on the United States, the reserved fishing rights of the Indians, is disavowed, the United States will have defrauded the Indians.

The Solicitor General is unwilling to put the United States in such a position and is now urging that the Indians have substantial arguments to support their contention that they are beneficiaries of the Treaty without being signatories and even adds that the Department of the Interior regards appellants as beneficiaries. He has rejected, as the court in *Northern Pacific* did, the argument that the United States may accept the cession and then disavow the burden of reserved rights. He has accepted the greater responsibility and refuses to weasel out of a promise made and accepted over one-hundred years ago. We respect his intellectual integrity.

Now, it is up to the Court to inquire whether the State

of Washington, as successor of the United States, can accept the lands granted by the Muckleshoots and dismiss the burdens promised as consideration for the same. The finding that they were not signatories must be accepted by the appellants as true. The finding that they ceded their lands and thus became beneficiaries likewise must be accepted by all parties as true. How, then, can the United States accept the cession of land from beneficiaries of a treaty and refuse to grant said benefits to those who must be acknowledged as beneficiaries without perpetrating a fraud; assuming such, the answer to the paradox is to allow the Muckleshoots to fight their fishing wars against the State of Washington just as the Puyallups and Nisquallys are now permitted to do.

WHEREFORE, appellants pray for rehearing in the above-entitled matter, for a note of probable jurisdiction, and setting the case down for a plenary hearing.

Respectfully submitted,

L. FREDERICK PAUL
Counsel for Appellants

FREDERICK POST
Of Counsel

CERTIFICATE OF MERIT

The undersigned, as counsel for said appellants, does hereby certify that the within petition for rehearing is presented in good faith and not for delay.

L. FREDERICK PAUL